Date: JUNE 18, 1996

Case No.: 94-DBA-57

In the Matter of:

Disputes concerning the payment of prevailing wage rates by and proper classification by:

NORTH AMERICAN CONSTRUCTION CORP. and C.H. NICKERSON AND CO., INC. d/b/a NICKERSON ENGINEERS AND CONTRACTORS,
General Contractors

and

SAFETY ELECTRIC CONSTRUCTION CO., INC.,
Subcontractor

and

Proposed debarment for labor violations by:

SAFETY ELECTRIC CONSTRUCTION CO., INC., and AMERICO GLORIA, individually and as President

With respect to laborers and mechanics employed by the contractors under Contract No. GS-02POCUC0030 NCT 87449/RCT 89151 for replacement of boilers and construction of Annex Building at Federal Building and Courthouse in Bridgeport, Connecticut; and contract No. CWF-110 #1 for construction of the Wastewater Treatment Facility at Ridgefield, Connecticut.

Appearances:

Kevin E. Sullivan, Esquire
Office of the Regional Solicitor
U.S. Department of Labor
One Congress Street, 11th flr.
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For the Complainant

William B. Barnes, Esquire
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For Safety Electric Construction Co., Inc.
and Americo Gloria

Joy Beane, Esquire
Day, Berry and Howard
One Canterbury Green
Stamford, CT 06901-2047
For Intervenor TIG Insurance Co.

Robert W. Heagney, Esquire
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For C.H. Nickerson and Co., Inc.

Lori B. Alexander, Esquire
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205 Church Street
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New Haven, CT 06509
For North American Construction Co.

Before:
DAVID W. DI NARDI
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL BACKGROUND

This proceeding began with an **ORDER OF REFERENCE** dated July 6, 1994 and signed by the Regional Administrator, Wage and Hour Division, Employment Standards Administration. (ALJ EX 1) This Order of Reference authorized a hearing pursuant to 29 C.F.R. §§ 5.11(b) and 5.12 on disputes concerning the payment of prevailing wage rates, overtime pay and proper record keeping and debarment arising under the labor standards provisions of the Davis-Bacon and Related Acts and the applicable implementing regulations issued thereunder at 29 C.F.R. Part 5.

Accordingly, disputes concerning the payment of prevailing wage rates, overtime, proper record keeping and proposed debarment, more particularly described in the caption of this Order, have been duly referred to the Office of Administrative Law Judges under the Davis-Bacon Act, 40 U.S.C. § 276a, **et seq.,** the Davis Bacon Related Acts, as denoted at 29 C.F.R. Part 5, the Contract Work Hours and Safety standards Act, 40 U.S.C. § 327, **et seq.,** and the applicable regulations issued thereunder at 29 C.F.R. Part 5, Sections 5.11(b) and 5.12.

Concerning the proposed debarment, the Regional Administrator of the Wage and Hour Division has found reasonable cause to believe that violations of the Davis-Bacon Act by Safety Electric Construction Co., Inc. and Americo Gloria constitute a disregard of their obligations to employees within the meaning of 29 C.F.R. § 5.12(b)(1) and that the actions of Safety Electric Construction Co., Inc. and Americo Gloria at issue herein constitute willful or aggravated violations of the labor standards of the Davis-Bacon Related Acts, as listed at 29 C.F.R. § 5.1.

These violations are more specifically described in the Wage and Hour Division's letters to the contractors, which are attached to the ORDER OF REFERENCE. Also attached are the letters in response from the contractors. (ALJ EX 1)

Pursuant to said laws, regulations and delegation of authority by the Secretary of Labor, the matter was assigned to this Administrative Law Judge and was duly scheduled for hearing by appropriate **NOTICE OF HEARING AND PRE-HEARING ORDER.** (ALJ EX 5) Several continuances were granted to permit the parties to complete their discovery, and a short continuance was granted because of the partial government shutdown impacting the Department of Labor. (ALJ EX 6 through ALJ EX 17A) Hearings were held on November 6,8,9 and 27, 1995 in New Haven and New London, Connecticut at which times the parties were afforded the opportunity to present oral argument, testimony and documentary evidence in support of their respective positions. The following references will be used herein: ALJ EX for an exhibit offered by this Administrative Law Judge, CX for an exhibit offered by the Administrator, RX for an exhibit offered by Respondents and TIGX for an exhibit offered by TIG Insurance Company.

Post-hearing evidence has been admitted as:

EXHIBIT NO.	ITEM	FILING DATE
ALJ EX 18	This Court's Order sending copies of CX 15 - CX 19, RX 3, RX 5 and RX 6 to the parties.	12/11/95

CX 21	Administrator’s request for an extension of time for the parties to file their briefs.	01/16/96
RX 7	Respondents’ motion for an extension of time for the parties to file their briefs. (the requests was granted)	01/18/96
ALJ EX 19	Letter sending two (2) subpoenas to counsel for the Administrator	01/23/96
CX 22	Administrator’s request for an additional extension of time as he had been recently assigned to another trial due to an office emergency.	02/09/96
ALJ EX 19A	The extension was granted as no objection was interposed	02/19/96
CX 23	Attorney Sullivan’s letter filing the	02/20/96
CX 24	February 5, 1996 letter from Brian L. Fisher, Associate General Counsel, Blue Cross Blue Shield of Connecticut, to Judith McFarren, Investigator, Wage and Hour Division, New Haven, Connecticut, as well as the	02/20/96
CX 25	Revised Summary of Unpaid Wage (Form WH-56) and Wage Transcription and Computation Sheets. (Form WH-55)	02/20/96
RX 8	Attorney Barnes’ request for a short extension of time for the parties to file their briefs. (the request was granted as there was no objection)	02/20/96
TIGX 1	February 20, 1996 from Attorney Joy Beane, on behalf of TIG Insurance Company as the assignee of North American Construction Corp., moving to intervene in the proceeding to exercise its rights to any overage of the amounts	02/22/96

	currently being withheld by the Administrator. (the motion is hereby granted as no objections have been raised to such interven-tion herein.)	
CX 14	A document entitled Actual Valuation; Safety Electric Construction Co., Inc. Profit Sharing Plan. Plan Year, July 1, 1990 Date of Valuation, June 30, 1991 (as no objections were filed thereto)	03/08/96
RX 9	Attorney Barnes' request for a short extension of time for the parties to file their briefs.	03/11/96
ALJ EX 20	The request was granted.	03/12/96
RX 10	The parties' request for an additional extension of time.	04/12/96
ALJ EX 21	The request was granted.	04/12/96
RX 11	The parties' request for a short extension of time.	05/13/96
ALJ EX 22	The request was granted.	05/14/96
RX 12	Attorney Barnes' letter confirming the briefing schedule.	05/20/95
RX 13	Respondents' brief	05/21/96
CX 26	Complainant's brief	05/22/96
RX 14	Respondents' Reply Brief	06/04/96

The record was closed on June 4, 1996 as no further documents were filed.

I. **Summary of the Evidence**

As noted above, this action was brought by the Secretary of Labor (herein Administrator or Complainant) as a result of alleged violations by Respondents, Safety Electric Construction Co., Inc. and Americo Gloria, of record keeping, prevailing wage, and overtime provisions of the Davis-Bacon Act, the Davis Bacon Related

Acts, and the Contract Work Hours and Safety Standards Act on two federal construction projects: the Federal Building and Courthouse in Bridgeport, Connecticut, and the Wastewater Treatment Facility at Ridgefield, Connecticut. Complainant submits that the record establishes that employees should be awarded back wages and that Respondents Safety Electric Construction Co., Inc. and Americo Gloria should be debarred for the appropriate period of time.

Respondent Safety Electric Construction Co., founded by its president, Americo Gloria, and his wife in 1975 or 1976,[1] performed work on these two projects as the electrical subcontractor, employing journeyman and apprentice electricians to do the work. (CX-8, CX-12, CX-13; Tr. 802, 842)

Respondents Safety Electric and Americo Gloria were obligated to pay prevailing wage rates and fringe benefits to their employee electricians consistent with General Wage Decision No. CT89-1, which was applicable to these two projects. (Tr. 496-498; CX-5; **see also** CX-8 and CX-10) Because the federal projects were located in Area 3 (Bridgeport and Ridgefield), the prevailing wage (basic hourly) rate including the fringe benefit required by the Wage Decision to be paid by Respondents to electricians was $27.95 per hour. (CX-5; Tr. 497-498, 510) Broken down, the prevailing wage (basic hourly) rate was $21.45 while the fringe benefit hourly rate was $6.50. (Tr. 511)

Respondents were also required to pay apprentice electricians—duly registered in a sanctioned apprenticeship program—a percentage of the $21.45 journeyman prevailing wage (basic rate) that ranged from 50% for the novice apprentice to 85% for the apprentice with the most hours of service plus the $6.50 fringe benefit hourly rate.[2] (CX-12, Tr. 601, 603; **see** 29 C.F.R. 5.5(a)(4)) The lowest apprentice rate including the hourly fringe benefit was $17.23 per hour ($10.72 + $6.50) (Tr. 911-913, 606-620) Respondents were required to pay an **unregistered** "apprentice" the journeyman prevailing wage (basic rate) of $21.45 plus the $6.50 per hour fringe benefit until the effective date of his registration. Even though properly registered, however, an apprentice must have been supervised by a journeyman (the required ratio being one apprentice to one journeyman) in order to be paid a percentage of the journeyman's rate. If unsupervised or if the ratio of apprentice to journeyman was anything more than one to

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[1] A licensed electrician since 1975 or 1976, Respondent Gloria was an apprentice electrician in 1971 and obtained a job as a shop electrician at U.S. Baird in Stratford, Connecticut, in 1971. (Tr. 802)

[2] Apprentices are entitled to 100% of the fringe benefit afforded "journeymen." (Tr. 603)

one, for instance two apprentices to one journeyman, then the Respondents were required to pay the "apprentice" the journeyman prevailing rate. (Tr. 603-606, 906, 916-917) In addition, Respondents' subcontract agreement explicitly required the payment of overtime compensation for all hours worked over forty in a workweek. CX-13 at p. 5, ¶ 20.

A. **Respondents Paid Less Than the Required Prevailing Wage**

Complainant submits that the record in this case clearly supports a finding that Respondents failed to pay the prevailing wage (basic hourly) rate of $21.45 per hour to journeyman electricians that worked on the Courthouse and Ridgefield federal projects. During his testimony, Respondent Americo Gloria conceded paying less than the prevailing rate of $21.45 to journeyman electricians by acknowledging the accuracy of wage rate figures reflecting hourly rates that Respondents actually paid employees who worked on the federal projects.[3] (CX-4, Tr. 853-855, 1050-1051) The record demonstrates that Respondents paid most of the journeyman electricians a basic rate of $17 or $17.50 per hour rather than the required basic prevailing rate of $21.45 per hour. (CX 4) Respondents' underpayment of the journeyman electrician prevailing wage rate is confirmed also by the certified payroll records for each project (CX-8 and CX-10) and by the testimony of employees Mario Fontes,[4] Almerindo Alves, Edwin Cruz, Kevin Karpinski,[5] Marco Russo, Allan Peck, Robert McSperrin, Bruce Toth,

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[3] Respondent Gloria asserts that the hourly wage rate entry contained in Exhibit CX-4 for Almerindo Alves inaccurately reflects Mr. Alves' status as an hourly rate employee when Mr. Alves was actually a salaried employee supervisor at Ridgefield. However, Respondent Gloria's assertion is undercut by the fact that Mr. Alves was paid an hourly rate as reflected on Respondents' own time cards. Moreover, Mr. Alves was paid an hourly rate on jobs other than Ridgefield as well. (Tr. 1050-1052) Finally, Mr. Alves' pay varied in accordance with the number of hours he worked in any workweek. (Tr. 54. **See** 29 C.F.R. § 778.114)

[4] Mr. Fontes complained to Respondents' job foreman about the company's failure to pay the prevailing wage rate but never received a response to his complaint. (Tr. 22)

[5] Mr. Karpinski testified that he complained to Safety Electric's job coordinator about getting less than the prevailing wage, but was told, "That's what you get and that's what he's paying you." (Tr. 131) He testified further that people on the job, including Safety Electric's supervisory personnel, were aware that Safety was paying less than the prevailing wage rate (continued...)

Rocco Cuscuna, Frank Pellaggi and Gregory Tetro. (Tr. 15-17, 50-52, 65-67, 126-127, 151-153, 173-175, 208-210, 224-225, 314-316, 334, 383-384, 386, 428-432)

B. **Respondents Failed to Pay the Required Fringe Benefits**

With regard to the fringe benefit package payment requirement, Respondents represented on the back of the certified payroll records that they contributed on behalf of each journeyman electrician $4.75 per hour for medical and dental insurance, $2.69 per hour to a pension and profit share plan and $3.46 per hour for holidays and vacations, and contributed on behalf of each apprentice electrician $4.75 per hour for medical and dental insurance, $1.65 per hour to a pension and profit share plan and $.96 per hour for holidays and vacations. This assertion was false, as established by the record, according to the Complainant. Respondent Americo Gloria, who gave his son the aforementioned fringe benefit figures for him to enter on the certified payrolls (Tr. 820-821), testified that those fringe benefit figures were only "estimates," not fringe benefit contribution payments actually made. (Tr. 772-773, 1035-1036) Although Respondent Gloria acknowledged that his contract required Respondents to furnish fringe benefits to each and every employee on the first day of their employment, Respondent Gloria admitted that Respondents did not do so. (Tr. 774-775) He testified that employees did not receive medical insurance until after a ninety-day waiting period, and that this waiting period also applied to employees' holiday and sick day benefits.[6] (Tr. 832, 1071) Furthermore, although Respondent Gloria acknowledged that Respondents' contract required that employees not covered by medical insurance be paid the medical fringe benefit in cash, he conceded that these employees did not receive medical fringe benefits in cash. (Tr. 777) Finally, Respondent Gloria admitted that he did not make pension fringe benefit contributions of $2.69 per hour for employees who worked on

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[5](...continued)
and that, even as the Labor Department investigation was proceeding, Safety continued to pay him and others less than the prevailing wage. (Tr. 132) Furthermore, Mr. Karpinski testified that he also worked for Safety Electric on a state prevailing wage project and believed he did not receive the prevailing wage. (Tr. 129)

[6] Respondent Gloria's testimony that the ninety-day waiting period was required by insurance company policy (Tr. 775) is contradicted by correspondence dated February 5, 1996 authored by Blue Cross Blue Shield of Connecticut's General Counsel Brian Fresher (CX 24), which correspondence reveals that the company's "waiting period" for coverage is 70 days or less.

the two federal projects.[7] (Tr. 783, 786-787) He also conceded that he did not directly pay these employees the pension fringe benefit cash equivalent of $2.69 per hour. (Tr. 787, 792)

When Judith McFarren, U.S. Department of Labor, Wage & Hour Division investigator, asked Respondent Gloria for documentation of the fringe benefit contributions actually made on behalf of employees who worked on the federal projects in order to reflect a credit toward Respondents' backwage liability on the Wage Computation and Transcription Sheets, Respondent Gloria provided her with a document showing medical benefits premiums paid and life insurance information for only a limited select group of employees—many employees' names were conspicuously absent from this document.[8] (Tr. 484-485, 513-514, CX-7) Based upon this information and employee interviews, Investigator McFarren determined (1) that most employees did not receive medical and dental benefits, (2) that those employees who did get medical and dental benefits received benefits that were less than $4.75 per hour, (3) that no employees received the pension and profit share plan benefits and (4) that Respondents' representation of a $3.46 per hour holiday and vacation benefit contribution was inflated.[9] (Tr. 536-537)

Investigator McFarren's determination of the aforementioned fringe benefit payment violations was confirmed by the testimony of employee witnesses, according to Complainant.

Mario Fontes testified that he received no sick pay and no medical insurance coverage. (Tr. 18-19)

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[7] Respondent Gloria attempted to justify Respondents' failure to make pension plan contributions for fiscal year 1990 on behalf of employees by claiming that Safety Electric did not have the money as a result of the federal government's withholding of monies on these federal projects. (Tr. 871)

[8] Investigator McFarren accorded to Safety Electric credit for medical insurance contributions made on behalf of employees based upon this document. (CX-7; Tr. 1112)

[9] Investigator McFarren suspected that Respondents' representation on the certified payroll records of hourly fringe benefit contributions, particularly their insurance benefit contributions, were inaccurate because fringe benefit contribution figures should have varied from employee to employee based upon variations in individual employee's earnings, ages, and number of dependents. However, Respondents' benefit contribution entries for employees were exactly the same—every single week for every single employee without variation. (Tr. 536-537)

Edwin Cruz, who was paid $17 per hour plus $2 per hour as a medical insurance benefit cash equivalent because he was already covered by his wife's medical insurance, testified that he did not receive any vacation pay or any other fringe benefits.[10] (Tr. 66-68, 75)

Custodio Ramos testified that he never received any type of benefits, that Respondents did not give him paid holidays but required Saturday work to get a holiday off and that Respondents refused to give him vacation pay. (Tr. 86, 97, 105-106)

Kevin Karpinski testified that he did not receive any fringe benefits with the exception of holiday pay for Christmas, and that he had to work a Saturday to get off Thanksgiving. (Tr. 127-128)

Marco Russo testified that he did not receive sick day, holiday pay or vacation pay benefits while working on the Ridgefield project. Mr. Russo also testified that employees' receipt of a paid holiday was conditioned on the employee making it up by working another day. (Tr. 160, 162)

Allan Peck testified that he did not get Christmas as a paid holiday. (Tr. 176-177)

Robert McSperrin testified that to his knowledge he did not receive any fringe benefits. (Tr. 213)

Bruce Toth testified that he received no medical benefits or vacation pay while on the Ridgefield project and that he did not believe that he received any sick pay. (Tr. 231-232)

Chris Matola testified that he did not receive medical or vacation pay benefits and that he was not presented with any kind of benefit package either in writing or orally. (Tr. 251) In fact, Mr. Matola testified that upon his hiring, he was told there were no benefits, just the flat rate of $12 per hour.[11] (Tr. 252-253, 260)

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[10] According to Mr. Cruz, "you had to be there for a year to get vacation pay." (Tr. 72)

[11] Unbeknownst to Mr. Matola, Investigator McFarren determined that Respondents did make an insurance contribution on his behalf. Significantly, however, Investigator McFarren gave Respondents an insurance benefit credit of $344.22 (CX-9 at A-13) for settlement negotiation purposes when in fact Respondents were entitled to less credit because Safety did not make the insurance benefit contributions on Matola's behalf beginning with his employment on the project but sometime after December 1991. (Tr. 599-600)

Rocco Cuscuna testified that he did not receive any medical benefits or vacation pay and that he did not believe that he received any holiday pay. (Tr. 317-318)

Anthony Pavone testified that he never received medical benefits until **after** he left the Ridgefield project and that his receipt of holiday pay for Thanksgiving was contingent upon him working Saturday. (Tr. 352-353)

Frank Pellaggi testified that he worked at Ridgefield for $17 per hour with no benefits and that he was not given Labor Day as a paid holiday. (Tr. 384, 386-387)

Ralph Sheldon testified that he never received benefits while at Ridgefield and that he did not receive any paid holidays, including Christmas and Thanksgiving. (Tr. 403-404)

Complainant submits that this summary of the testimony by Respondents' employees, including Respondent Americo Gloria's own admission, demonstrates not only that Respondents committed fringe benefit violations but also that Respondents' "estimates" of fringe benefit contributions were gross exaggerations without basis in fact.[12] Even when we select employees that received Respondents' highest fringe benefit contribution, Respondents' estimates are unrealistic and exaggerated. For example, Respondents represented on their certified payrolls that they made medical benefit contributions on behalf of Mr. Tetro of $4.75 per hour or a yearly contribution of approximately $9,880. In fact, Mr. Tetro's monthly medical premium was only $272.26 or $3,267 per year. Even though Investigator McFarren accorded Respondents an excessively generous credit in the amount of $314.48 per month, or $3,773 per year, this credit was still **$6,107 less per year** than what Respondents claimed was actually contributed on Mr. Tetro's behalf. (Tr. 537-539, 572-575; CX-6 at A-14)

Furthermore, with regard to Almerindo Alves, Respondents represented that he was paid a fringe benefit package of approximately $11 per hour when he was actually paid only $3.83 per hour——a shortfall of approximately $7 per hour. (Tr. 577-279; CX-9, CX-10)

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[12] Respondent Gloria testified that it was sheer "accident" that his fringe benefit hourly contribution entries [$4.75 medical + $2.69 pension + $3.46 holiday/vacation] when combined with the hourly rate of $17 or $17.50 he actually paid to journeymen just happened to equal the total prevailing rate and fringe benefit package required by the applicable wage decision. (Tr. 1095-1098)

Finally, although Respondents in fact made no pension contribution on behalf of employees during the time these employees performed work on the federal projects, Respondents nonetheless represented making contributions in the amount of $2.69 per hour or $5,491 per year on behalf of each and every employee. (Tr. 539)

C. Respondents Paid Apprentice Electricians Less Than the Required Wage Rate

According to Complainant, responsibility for registering apprentices and complying with the apprenticeship ratio requirements found at 29 C.F.R. § 5.5(a)(4) rests with the contractor. **Van Den Heuvel Electric, Inc.,** WAB Case No. 91-03 (February 13, 1991); **Kasler Corporation,** WAB Case No. 90-03 (April 29, 1991); **Schnabel Associates, Inc.,** WAB Case No. 89-18 (June 28, 1991); **Sid Grinker Company, Inc.,** WAB Case No. 92-07 (September 25, 1992).

Complainant submits that the record supports a finding that Respondents shirked that responsibility because they paid electricians designated as apprentices on certified payrolls less than the required percentage of the journeyman prevailing wage rate plus fringe benefits as mandated by Connecticut's apprentice registration program. (**See** CX-12; Tr. 613-621) Since Exhibit CX-4 and testimonial evidence demonstrate that Respondents paid electricians identified as apprentices hourly rates that ranged from only $10 to $12.50 per hour and since these employees received little or no fringe benefits, these employees, some of whom were not properly registered or supervised, were paid less than even the lowest apprenticeship rate of 50% of the journeyman's rate plus fringe benefits or $17.23 per hour.[13] (Tr. 35, 86, 90, 197-199, 201-202, 249, 252-253, 260, 351-355, 400-406, 411, 621)

By way of illustration, Investigator McFarren determined that Chris Matola worked on the federal project beginning on October 4, 1991 but was not effectively registered as an apprentice until November 20, 1991. Accordingly, for the work weeks from October 4, 1991 until November 20, 1991, Mr. Matola, who was paid $12 per hour, should have been paid the basic journeyman's rate of $21.45 per hour (not including the $6.50 per hour in fringe benefits).

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[13] As noted earlier, duly registered and properly supervised apprentices are entitled to a percentage of the journeyman’s prevailing wage rate—a newly registered apprentice receiving 50% of the rate. Apprentices are, however, entitled to 100% of the fringe benefit afforded journeymen. (Tr. 603) Unregistered and/or "unsupervised" or inadequately supervised (apprentice to journeyman ratio greater than one to one) apprentices must be paid the full journeyman’s prevailing wage rate and fringe benefits of $27.95 per hour. (Tr. 603-606, 906, 916-917)

After November 20, 1991, Mr. Matola was paid $12 per hour when he should have been paid 65% of the basic prevailing rate of $21.45 or $13.54. (Tr. 610-612; CX-12) When Mr. Matola's fringe benefit package entitlement is added to his $13.94 basic apprentice rate, Mr. Matola should have been paid $20.44 per hour. (Tr. 612) Accordingly, Safety underpaid Mr. Matola $8.10 per hour from November 20, 1991 until his employment on the federal project ended, resulting in a total underpayment amount for that period of $3,848.69. (Tr. 613; CX-9 at A-13)

Moreover, Mr. Matola's testimony reveals that Respondents failed to adequately supervise both him and his partner apprentice for the majority of their time at Ridgefield. Mr. Matola testified that he worked with another apprentice at Ridgefield without any supervision. They would receive their assignments in the morning setting out their tasks for the eight hour span or for the week. (Tr. 255) With the exception of work on "risers," where four or five apprentices worked with one or two journeymen periodically, Mr. Matola and his partner apprentice worked alone. (Tr. 256-257) He estimated that two to three weeks involved supervised work, while the rest of the weeks involved unsupervised work. (Tr. 257)

In light of this evidence, with the exception of two to three weeks, Mr. Matola should have been paid the full journeyman's rate plus fringe benefits of $27.95 and the investigator's original backwage computation for him should be considerably larger. (**See** Investigator's Post-Hearing filed Revised Wage Computations dated February 7, 1996 and in evidence as CX 25)

Anthony Pavone, an apprentice registered on September 3, 1995 and without supervision the majority of his time on the project from November 18, 1991 to November 27, 1991, should have received the journeyman rate of $21.45 plus fringe benefits rather than the $10 per hour, $11 per hour, and $12 per hour rates paid him by Respondents.[14] (Tr. 351-355, 358-359, 369) Because the investigator credited Respondents with 50% of the rate plus fringe benefits on her original backwage computation sheet (CX-9 at A-15, CX-12), Mr. Pavone's backwages of $2,096 reflected on that computation sheet should actually be doubled. (Tr. 614-616) (**See** Investigator's Post-Hearing filed Revised Wage Computations dated February 7, 1996 [CX 25])

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[14] Mr. Pavone testified that at Ridgefield he worked alone every day without supervision running pipe, wiring lights and devices and pulling wires. (Tr. 358, 369) During his actual work process, there was no involvement of his supervisors. Only after he had already completed the job would the supervisor look at the work and then assign Pavone another project. (Tr. 359)

Ralph Sheldon, an apprentice registered on July 26, 1991 who should have been paid 50% of the journeyman prevailing rate and fringe benefit package of $27.95 when he began work on the project, or $17.23 per hour (**see** CX-9 at A-21), was initially paid only $10.98 per hour **including** fringe benefits. (Tr. 911-913, 616-620, 400-401) From February 7 to February 24, 1992, Mr. Sheldon should have received $18.30 per hour (fringe benefits included), 55% of the journeyman's rate, but was only paid $12.98 per hour (fringe benefits included).[15]

D. Respondents Failed to Pay Any Overtime Compensation

According to Complainant, it is uncontroverted that Respondents failed to pay overtime compensation to employees who worked over forty (40) hours in a work week on the federal projects. Employee witnesses testified consistently that they were paid at straight time for all hours worked in excess of forty in a week.[16] (Tr. 15-17, 37, 93-94, 127, 199-200, 210-212, 227-228, 249-250, 318-320, 355-357, 432) Not only did Respondents present no evidence to dispute their failure to pay required overtime compensation, but Respondent Gloria also admitted that his company had a policy of not paying employees overtime compensation—paying only straight time pay for hours worked over forty in a workweek.[17]

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[15] Mr. Sheldon was informed by Respondent Gloria at a shop meeting on February 21, 1992 that he was supposed to have been paid $16.57 as an apprentice. Respondent Gloria issued a notice on company letterhead notifying Mr. Sheldon of the correct rate. (Tr. 406) However, Respondents never reimbursed Sheldon the difference between that $10-11 rate paid him and the $16.57 figure Respondent Gloria identified as the required rate. (Tr. 406)

[16] Bruce Toth testified that upon his hiring, Respondents told him that it was company policy not to pay overtime compensation. (Tr. 228)

Edward Seixas and Louis DeCurzio testified that they worked for Respondents on other projects and never received any overtime compensation when they worked over forty hours. (Tr. 39-40, 200)

Custodio Ramos and Anthony Pavone testified that they received two paychecks in one workweek—one for straight time hours and one for overtime hours. The checks for overtime hours reflected straight time pay, not time and one-half. (Tr. 98-99, 375-376)

[17] Kevin Karpinski testified that Respondent Gloria told him that if you work overtime, you'll be paid straight time. (Tr. 142) He further testified that he "had no choice, really"

(continued...)

E. Respondents Violated Record-keeping Requirements

Under 29 C.F.R. §§ 3.4(b) and 5.5(a)(3)(i) and (ii), a contractor is required to maintain accurate weekly records stating, inter alia, each employee's job classification, pay rates, daily and weekly hours worked, and actual wages paid. Under § 5.5(a)(3)(ii)(3), the contractor must certify that the employees were paid the wage rates applicable to the classifications in which they worked, according to Complainant.

When Investigator McFarren met with Respondent Americo Gloria and reviewed Respondents' payroll records sometime around November 13, 1991, Respondent Gloria told her that the time cards, which formed the basis for information entered on the payroll records, were thrown away once the weekly payroll was completed. (Tr. 474) Since the payroll records did not reflect employees' hourly pay rates, Investigator McFarren asked Respondent Gloria for a list of employees' names with their associated pay rates. (Tr. 474) He provided Investigator McFarren with such a list in lieu of the time cards, which time cards he asserted he had thrown out. (Tr. 475, 482) Based upon the data in this list coupled with Respondents' weekly payroll records, Investigator McFarren determined that Respondents were paying employees straight time for overtime work. (Tr. 483)

Investigator McFarren, after conducting confidential employee interviews, visiting job sites and reviewing project job logs, Investigator McFarren ultimately presented Respondent Gloria with

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[17](...continued)
about honoring the foreman's request to work overtime because he "had to continue on working on the weekend or late at night to complete the job" that the foreman stressed needed to be finished at a certain time. (Tr. 892-893)

Bruce Toth testified that he was told upon his hiring that it was company policy not to pay overtime compensation. (Tr. 228)

Robert McSperrin and Anthony Pavone testified that when they expressed to Respondents' foremen their concern about not getting overtime compensation, the foremen responded—that's the way it is. (Tr. 212-213, 357)

Allen Peck testified that Respondent Gloria approached him about being paid a separate check for straight time hours worked (forty hours and less) and a separate check for overtime hours worked, but he told Mr. Gloria that if that was going to be the practice, he would not work the overtime. Mr. Peck stated that "That's one of the reasons why I don't have any overtime over at Ridgefield." (Tr. 178-179)

her back wage computations and a back wage liability bill sometime in January 1992. (Tr. 485-486) Respondent Gloria then obtained legal representation. After a series of meetings involving Investigator McFarren and Respondent Gloria and his attorneys, Respondent Gloria's attorney called the Department to inform Investigator McFarren that the time cards had been found. (Tr. 487) Investigator McFarren then updated her investigation based on the sudden appearance of these time cards. (Tr. 488)

Based upon her review of these time cards, Investigator McFarren determined that the certified payrolls were falsified because Saturday work and overtime work reflected on Respondents' time cards were not reflected on their certified payroll records. (Tr. 489) Every one of Respondents' certified payroll records reflected forty hours worked or less than forty hours worked each and every week for every employee. (Tr. 542-543; **See** CX-8 [Courthouse certified payroll records]; Tr. 572-574) Respondents' own time cards, however, indicated that employees worked over forty hours in given work weeks notwithstanding the fact that the certified payroll records reflected forty hours or less for each and every work week. (Tr. 543-544) Saturday work actually performed by employees was also not reflected on the certified payroll records.[18] (Tr. 573)

Investigator McFarren identified other Record-keeping irregularities based upon her review of Respondents' time records which contained some cross-outs and insertions that did not appear to be in the employee's handwriting. For instance, Mike Evans' time card with an ending date 12/13/91 contained a cross-out of the Courthouse job location and an entry in its place of Connecticut Post Mall——a non-federal, non-prevailing wage job. Investigator McFarren reasonably concluded that Respondents crossed out "courthouse" and substituted the non-prevailing rate Connecticut

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[18] Respondent Gloria testified that he assigned his eighteen- or nineteen-year-old son, Rui Gloria, the task of completing the certified payrolls, without supervision. (Tr. 820-821, 1035) Rui Gloria testified that he prepared the certified payrolls by relying on the information contained on Safety Electric's time cards. (Tr. 994) He testified that he did not record on the certified payrolls more than forty hours worked in any week for each employee because he "was trying to be quick about it and get these in, I guess." (Tr. 995, 1014-1015, 1029) Furthermore, he testified flatly that he did not make overtime hour entries because he did not want the general contractor to think that Safety Electric was charging them for work that had not been done. (Tr. 1016-1017)

Post Mall job to reduce its backwage liability.[19] (Tr. 635-641, CX-11) Accordingly, Investigator McFarren reflected on her backwage computation sheet that Mr. Evans worked not on the Connecticut Post Mall job but on the courthouse prevailing wage job. (Tr. 637-638, CX-6)

Other examples of Record-keeping irregularities were identified by Investigator McFarren with regard to Respondents' reducing overtime hours reflected on employee Jerry Sullivan's weekly time records for the week ending 11/15/91. (Tr. 641-644; CX-11) In addition, with respect to employee Bruce Toth, who was employed 57 hours at Ridgefield for the work week ending 11/2/91 as reflected on his time card, there was no corresponding certified payroll record for Toth for that particular workweek. Accordingly, Investigator McFarren transcribed 57 hours for Toth onto the Wage Transcription and Computation Sheet with the date 11/8/91, which date is the pay date that corresponds to the workweek ending date of 11/2/91.[20] (Tr. 589-591) Similarly, with respect to employee Chris Matola, who was employed for 44 hours for work week ending 10/5/91, Mr. Matola does not appear on the certified payroll for that work week. (Tr. 592) Moreover, Mr. Matola, who was employed during work weeks ending 12/20/91, 12/27/91, and 1/10/92, was not listed on any certified payroll record corresponding with that date. (Tr. 593-596) In fact, Mr. Matola, who was employed during work weeks in January and February 1992, was not listed on any certified payroll record corresponding with that employment period. (Tr. 596) Finally, Mr. Matola was not paid for a sick day he took on January 20, 1992. (Tr. 597)

Investigator McFarren's findings of Respondents' Record-keeping irregularities were also confirmed by Ms. Sandra Barrachina, a field supervisor for the Wage and Workplace Standards Division at the Connecticut Labor Department, during the course of the state investigation she conducted jointly with Investigator McFarren.[21] On Investigator Barrachina's visit to Respondents'

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[19] Anthony Pavone testified that he recalled one occasion when Respondent Gloria asked him to falsify an entry on his time card by indicating that he worked at the Bunnell High School for several weeks when he was not even working at Bunnell at that time. (Tr. 368-369)

[20] Respondents' time cards and certified payroll records are dated in accordance with workweek ending dates while Investigator McFarren's computation sheets that correspond to Respondents' time cards are dated six days later to reflect the "pay" date. (Tr. 589-590, 592)

[21] Investigator Barrachina is responsible for supervising wage enforcement and prevailing wage unit field investigators at the (continued...)

establishment in February 1992 to do a record audit, Respondent Gloria represented to her that Respondents' time cards were discarded after people were paid. (Tr. 923) Respondent Gloria's attorney subsequently contacted Investigator Barrachina informing her that the time cards had been found; those time cards were reviewed at the attorney's office on March 24, 1992. (Tr. 924)

Investigator Barrachina's review of time cards revealed overtime Record-keeping under-reporting, erasures, and cross-outs reducing numbers of hours worked to reflect proper overtime compensation being paid when straight time was actually paid as well as erasures and cross-outs eliminating a state prevailing rate job and substituting a private job so that a prevailing rate would not be required to be paid. (Tr. 926) Specifically, Investigator Barrachina determined that Respondents had paid straight time for overtime work on eight occasions in 1991 as reflected on eight time cards and that time cards for 28 weeks in 1991 reflected erasures and cross-outs and reductions of hours to make it appear that time and one-half was paid and to match the payroll. (Tr. 936-937, 958-965; **see** CX-15 through CX-19)

Investigator Barrachina testified that based upon her six years experience as a field supervisor, Respondents' Record-keeping irregularities signified "an attempt to circumvent the requirements of overtime to make it appear that you're in compliance." (Tr. 926.) This attempt to circumvent overtime requirements was a deliberate act of Respondents, according to Investigator Barrachina, because the company's reduction of hours was calculated mathematically to closely feign overtime payment compliance. She noted that Respondents' Record-keeping falsification was corroborated by employees who indicated that they did not alter their own time cards. (Tr. 927-928, 948)

The state investigation, like the federal investigation, examined Respondents' payment of fringe benefits in addition to the payment of prevailing wages and overtime. (Tr. 932) The same fringe benefit figures that Respondents entered on the federal certified payrolls were also entered on the certified payrolls applicable to the Bunnell school project, a subject of the state investigation. When questioned by Investigator Barrachina about pension contributions, Respondent Gloria did not provide her with any pension contribution payment information. (Tr. 933, 934)

With regard to her review of Respondents' insurance premium payment documentation, Investigator Barrachina determined that Respondents' actual payments made on behalf of some employees were much less than what Respondents represented as having been paid on

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[21](...continued)
Connecticut Labor Department. (Tr. 921-922)

behalf of employees on the certified payrolls. (Tr. 933-934) Furthermore, although Respondents represented on the certified payrolls that they had made contributions to furnish medical insurance to all employees, some employees in fact received no medical insurance. (Tr. 934) Investigator Barrachina also determined that most employees did not receive either holiday or vacation pay notwithstanding Respondents' representation on the certifiers of a generous holiday/vacation benefit package.[22] (Tr. 934)

F. Respondents' Backwage Liability

According to Complainant, it is well settled that where payrolls are unreliable, backwages may be assessed on the basis of employee testimony. It is likewise settled that the Secretary may obtain backwages for non-testifying employees where the record and testimony of testifying witnesses establishes that they are entitled to compensation. **See, In The Matter of Structural Services,** WAB No. 82-13 (June 22, 1983). **Also see, Matter of Schnabel Associates, Inc., supra, and M.G. Allen and Associates,** 29 WH Cases (BNA) 374 (1988), citing both **Structural Services and Anderson v. Mt. Clemens Pottery Co.,** 328 U.S. 680, 66 S.Ct 1187 (1946). An employer who has failed to keep accurate records of employees' hours worked may not complain that the Secretary's backwage computations are imprecise. **Schnabel, supra, citing Anderson,** and referencing **Brock v. Norman's Country Market,** 835 F.2d 823 (9th Cir. 1988). **Accord, P.M.B.C., Inc.,** CCH LLR WH Ad. Rulings, ¶ 32,058 (WAB 1991), citing **Brock v. Seto,** 790 F.2d 1446, 1448 (9th Cir. 1986). The Wage Appeals Board has held that backwage awards based upon "reconstructed" backwage computations based in part on employee-provided evidence are appropriate in

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[22] Investigator Barrachina concluded that Respondents underpaid 44 employees $291,935 in overtime wages, prevailing wages and fringe benefits for work performed on five state prevailing wage projects. (Tr. 935) Respondent Gloria did not contest the investigator's findings. On April 27, 1992 and June 10, 1992, Respondent Gloria acknowledged that he was aware that he was required to pay the prevailing wage, that he had signed contracts requiring it, and that he was aware that he had to pay overtime but did not pay overtime. (Tr. 935) Respondent Gloria ultimately pled guilty to criminal charges in the State of Connecticut court system in connection with his failure to pay overtime on these state projects. (Tr. 806, CX-1)

After the aforementioned investigation, the state conducted another investigation covering the period from January 1993 through February 19, 1993, which revealed that Respondents had again violated the prevailing wage law by underpaying an apprentice. (Tr. 955-959)

Davis-Bacon Act cases. **Trataros Construction Corporation,** CCH LLR WH Ad. Rulings ¶ 32,266 (WAB 1993).

Investigator McFarren, based upon information contained on Respondents' own time card records, Respondents' employee pay rate list (CX 4), employee interviews, and Connecticut's apprenticeship program information (CX-12), calculated Respondents' backwage liability, which is reflected on Wage Transcription and Computation Sheets applicable to both the Courthouse and Ridgefield projects. (Tr. 483, 485-486, 498-501, 601-606, 613-621) She then transcribed the backwage gross amounts found due Respondents' employees onto a Summary of Unpaid Wages. (Tr. 501-501; CX 6 and CX 9) With regard to the Courthouse project, Investigator McFarren determined that Respondents underpaid fifteen employees a total amount of $49,686.95 as a result of Respondents' prevailing wage, fringe benefit and overtime pay violations. With regard to the Ridgefield project, she determined that Respondents underpaid twenty-four employees a total amount of $89,823.46 as a result of Respondents' prevailing wage, fringe benefit and overtime pay violations. (CX 6 and CX 9)

However, because employee testimony during the trial revealed additional wage under-payments not reflected on Investigator McFarren's original backwage liability calculations set forth in Exhibits CX 6 and CX 9, Investigator McFarren made adjustments to her calculations. Those backwage adjustments are reflected on "revised" Summary of Unpaid Wages and Wage Transcription and Computations Sheets dated 2/7/96 applicable to both projects. These "revised" backwage liability calculations were submitted to the Court and Respondents on a post-hearing basis and have been admitted as CX 25.

Ridgefield Project

With regard to backwage liability adjustments made pertinent to the Ridgefield project, Investigator McFarren determined that Respondents' total backwage liability increased from $89,823.46 to $100,764.63. The specific adjustments made in that increase of Respondents' backwage liability are supported by testimonial evidence and are identified below.

Chris Matola's fringe benefit package credit accorded Respondents on the Investigator's original wage computation sheet (**see** CX-9 at A-13) was as follows:

Medical Insurance - $344.22 ÷ 693 hours (4 months) = $.50 per hour credit

Holidays - 2½ days X 8 hours X $12 = $240 ÷ 693 (4 months) = $.34 per hour credit

Total Credit - $.84 per hour credit

Because Mr. Matola testified that he did not receive medical benefits and that he received only two paid holidays, Respondents' fringe benefit credit was reduced and adjusted on the Investigator's revised wage computation sheet as follows:

Medical Insurance - $0 per hour credit

Holidays - 2 days X 8 hours X $12 = $192 ÷ 693 (4 months) = $.28 per hour credit

Total Credit - $.28 per hour credit

In addition, since Mr. Matola testified that he was under the supervision of a journeyman electrician for only two to three weeks on the federal project, Mr. Matola's backwages were further adjusted to reflect the full journeyman rate for 674 hours worked on the project while the apprentice rate was computed for the three weeks or 120 hours that Mr. Matola worked "unsupervised." As a result of these adjustments, Mr. Matola's backwages were increased $2,725.50 from $9,289.46 to $12,014.96 as reflected on the revised wage computation sheet.

Anthony Pavone's fringe benefit package credit accorded Respondents on the Investigator's original wage computation sheet (**see** CX-9 at A-15) was as follows:

Medical Insurance, paid holidays and sick days - $1.65 per hour credit

Because Mr. Pavone testified that he did not receive medical benefits, that he received only one paid sick day and only one paid holiday, Respondents' fringe benefit credit was reduced and adjusted on the Investigator's revised wage computation sheet as follows:

Medical Insurance - $0 per hour credit

Holiday - 8 hours X $11 = $88 ÷ 520 hours (3 months) = $.17 per hour credit

Sick Days - 8 hours X $11 = $88 ÷ 520 hours (3 months) = $.17 per hour credit

Total Credit - $.34 per hour credit

In addition, since Mr. Pavone testified that he was not supervised by a journeyman electrician for hours he worked on the project, Mr. Pavone's backwages were further adjusted to reflect the full journeyman rate for a total of 379 hours worked on the project. As a result of these adjustments, Mr. Pavone's backwages were increased $4,193.76 from $2,096.43 to $6,290.19 as reflected on the revised computation sheet.

Allan Peck's fringe benefit package credit accorded Respondents on the Investigator's original wage computation sheet (**see** CX-9 at A-16) was as follows:

Medical Insurance	- $314.48 X 12 months = $3,773.76
Vacation	- 10 days X $17.50 X 8 hours = $1,400
Holidays	- 6½ days X $17.50 X 8 hours = $910
Sick Days	- 4 days X $17.50 X 8 hours = $560
Total Credit	- $6,643.76 ÷ 2080 hours (one year) = $3.19 per hour credit

Because Mr. Peck testified that he received only one week paid vacation, only two paid sick days, and only five holidays plus two paid hours off on Christmas Eve, Respondents' fringe benefit credit was reduced and adjusted on the Investigator's revised wage computation sheet as follows:

Medical Insurance	- $314.48 X 12 months = $3,773.76
Vacation	- 5 days X $17.50 X 8 hours = $700
Sick Days	- 2 days X $17.50 X 8 hours = $280
Holidays	- 5 days X $17.50 X 8 hours = $700
Christmas Eve	- 2 hours X $17.50 = $35
Total Credit	$5,488.76 ÷ 2,080 (one year) = $2.64

As a result of these adjustments, Mr. Peck's backwages were increased $412.50 from $5,466.45 to $5,878.95 as reflected on the revised computation sheet.

Marco Russo's $379.32 backwage entitlement was based upon Respondents' time records, a large number of which were missing for Mr. Russo, which records indicated that Mr. Russo worked a total of only two Saturdays of overtime. This information was reflected on the Investigator's original wage computation sheet (**see** CX-9 at A-19) as follows:

DBRA Rate - $21.45 + $5.70 fringe benefit = $27.95 per hour
Rate Paid - $17 per hour

Prevailing Wage Underpayment - $10.95 per hour X 17½ hours = $191.63

Overtime Underpayment - $21.45 per hour X .5 X 17½ hours = $187.69

Total Backwages Due - $379.32

Because Mr. Russo testified that he worked seven weeks on Saturday and Sunday and one week on just Saturday, Respondents' backwage liability was increased and adjusted on the Investigator's revised wage computation sheet (an average number of hours [19½ hours] for each week was used to compute these backwages) as follows:

DBRA Rate - $27.95

Rate Paid $17

Prevailing Wage Underpayment - $10.95 per hour X 146 hours = $1,598.70

In addition, Mr. Russo's performance of work on Saturdays and Sundays resulted in Mr. Russo working overtime the entire time of his employment on the federal project. Accordingly, half-time pay was computed for Mr. Russo - $21.45 X .5 X 146 overtime hours = $1,565.85

Total Backwages Due - $1,598.70 + $1,565.85 = $3,164.55

As a result of these adjustments, Mr. Russo's backwages were increased by $2,785.23 from $379.32 to $3,164.55.

Edward Seixas' fringe benefit package credit accorded Respondents on the Investigator's original wage computation sheet (**see** CX-9 at A-20) was as follows:

Medical Insurance - $314.48 X 12 months = $3,773.76

Vacation - 10 days X $12.50 X 8 hours = $1,000

Holidays - 6 days X $12.50 X 8 hours = $600

Sick Days - 4 days X $12.50 X 8 hours = $400

Total Credit - $5,773.76 ÷ 2,080 hours (one year) = $2.78 per hour credit

Because Mr. Seixas testified that he did not take any sick days, Respondents should not have been given credit for four paid sick

days. Accordingly, Respondents' fringe benefit credit was reduced and adjusted on the Investigator's revised wage computation sheet as follows:

Medical Insurance	- $314.48 X 12 months = $3,773.76
Vacation	- 10 days X $12.50 X 8 hours = $1,000
Holidays	- 4 days X $11.50 X 8 hours, 2 days X $12.50 X 8 hours = $768
Sick Days	- $0
Total Credit	- $5,541.76 ÷ 2,080 hours (one year) = $2.66 per hour credit - $2.78 - $2.66 = $.12 X 154½ hours = $20.94 underpayment

Also, on Exhibit A-20 an error was made at the bottom of the original computation sheet, the entry of $18.30 less $15.28 should have read $18.30 less $14.28, not $15.28, which equals $4.02, not $3.02. This caused an increase of $8 to $20.94 or $28.94.

Ralph Sheldon's fringe benefit package credit accorded Respondents on the Investigator's original wage computation sheet (**see** CX-9 at A-21) was as follows:

Medical Insurance	- $344.24 (one month premium) ÷ 520 hours (3 months) = $.66 per hour credit
Holidays	- 2 days X $10 X 8 hours = $160 - 2 days X $11 X 8 hours = $176 - (Total $336) ÷ 1,040 hours (6 months) = $.32 per hour credit
Total Credit	- $.66 + $.32 = $.98 per hour credit

Because Mr. Sheldon testified that he did not receive medical benefits or holiday pay, the $.98 fringe benefit credit was eliminated and Mr. Sheldon's backwages were accordingly increased by $795.24 from $4,801.15 to $5,596.39 as reflected on the revised computation sheet.

Courthouse Project

With regard to the backwage liability adjustments made pertinent to the Courthouse project, Investigator McFarren determined that Respondents' total backwage liability increased from $49,686.95 to $51,749.73. The specific adjustments made that increase Respondents' backwage liability are supported by testimonial evidence and are identified below.

Mario Fontes' fringe benefit package credit accorded Respondents on the Investigator's original wage computation sheet (**see** CX-6 at A-4) was as follows:

Medical Insurance - $1,288.44 ÷ 360 hours (2 months) = $3.58 per hour credit

Holidays - 2 days X $17.50 X 8 hours = $280 ÷ 867 hours (5 months) = $.32 per hour credit

Total Credit - $3.58 + $.32 = $3.90 per hour credit

Because Mr. Fontes testified that he did not receive medical benefits, sick pay, or vacation pay, Respondents' fringe benefit credit was reduced and adjusted on the Investigator's revised wage computation sheet as follows:

Medical Insurance - $0

Holidays - 2 days X $17.50 X 8 hours = $280 ÷ 867 hours (5 months) = $.32 per hour credit

Total Credit - $.32 per hour credit

As a result of this reduction in credit, Mr. Fontes' backwages were increased by $1,170.66 from $4,886.74 to $6,057.40 as reflected on the revised computation sheet.

Kevin Karpinski's fringe benefit package credit accorded Respondents on the Investigator's original wage computation sheet (**see** CX-6 at A-6) was as follows:

Medical Insurance - $379.90 X 4 months = $1,519.60 ÷ 693 hours (4 months) = $2.19 per hour credit

Holidays - 3½ days X $17.50 X 8 hours = $490 ÷ 1,213 hours (7 months) = $.40 per hour credit

Sick Days - 1 day X $17.50 X 8 hours = $140 ÷ 1,213 hours (7 months) = $.12 per hour credit

Total Credit - $2.19 + $.12 + $.40 = $2.71 per hour credit

Because Mr. Karpinski testified that he received only one holiday, no paid sick days, and no vacation, Respondents' fringe benefit credit was reduced and adjusted on the Investigator's revised wage computation sheet as follows:

Medical Insurance - $379.90 X 4 months = $1,519.60 ÷ 693 hours (4 months) = $2.19 per hour credit

Vacation - $0

Holidays - 1 day X $17.50 X 8 hours = $140 ÷ 1,213 hours (7 months) = $.12 per hour credit

Sick Days - $0

Total Credit - $.12 + $2.19 = $2.31 per hour credit

As a result of this reduction in credit by $.40 per hour, Mr. Karpinski's backwages were increased by $281.60 ($.40 per hour X 704 hours worked on project) from $6,516.54 to $6,798.14 as reflected on the revised computation sheet.

Custodio Ramos' fringe benefit package credit accorded Respondents on the Investigator's original wage computation sheet (**see** CX-6 at A-10) was as follows:

Medical Insurance - $150.08 X 12 months = $1,800.96

Vacation - 10 days X $12.50 X 8 hours = $1,000

Holidays - 3 days X $12 X 8 hours = $288
- 3½ days X $12.50 X 8 hours = $450

Total Credit - $3,538.96 ÷ 2,080 hours (one year) = $1.70 per hour credit

Because Mr. Ramos testified that his vacation was taken before the Courthouse project (resulting in his hourly rate being less than reflected on the original wage computations) and that he received only five paid holidays, Respondents' fringe benefit credit was reduced and adjusted on the Investigator's revised wage computation sheet as follows:

Medical Insurance - $150.08 X 12 months = $1,800.96

Vacation - 10 days X $8 X 8 hours = $640

Holidays - 3 days X $12 X 8 hours = $288
- 2 days X $12.50 X 8 hours = $200

Total Credit - $2,928.96 ÷ 2,080 hours (one year) = $1.41 per hour credit

As a result of this reduction in credit by $.29 per hour ($1.70 less $1.41), Mr. Ramos' backwages were increased by $369.38 from $8,088.24 to $8,457.62 as reflected on the revised computation sheet.

Edward Seixas' fringe benefit package credit accorded Respondents on the Investigator's original wage computation sheet (CX-6 at A-11) was $2.78 per hour based upon Respondents being given credit for four paid sick days. Because Mr. Seixas testified that he did not take any sick days, Respondents' fringe benefit credit was reduced by $.12 per hour from $2.78 per hour to $2.66 per hour on the revised computation sheets. Moreover, since Mr. Seixas also testified that he was an "unsupervised" apprentice electrician for three days on the federal project, his pay of $12.50 per hour for those three days (24 hours) should have been $21.45 per hour and his backwages as reflected on the revised computation sheets increased by $8.95 per hour X 24 hours. As a result of these adjustments, Mr. Seixas' backwages were increased by $241.14 from $1,200.14 to $1,441.28 as reflected on the revised computation sheet.

G. Debarment is Warranted:

In the instant case, Respondents' work on the Bridgeport Federal Building and Courthouse implicates the Davis-Bacon Act, not one of the "Related Acts." **See** CX-13; ALJ EX 1. Where a contractor disregards its obligations under the Davis-Bacon Act, debarment for three years is mandatory and (in contrast to Davis-Bacon Related Act cases) evidence of "mitigating factors" or "extraordinary circumstances" is irrelevant. **See, G & O General Contractors, Inc.,** WAB Case No. 90-35 (February 19, 1991) and 29 C.F.R. 5.12(a)(2).

Respondents also performed work on the Ridgefield Wastewater Treatment Facility, which implicates the Davis-Bacon Related Acts, namely the Federal Water Pollution Control Acts. (ALJ EX 1) Under the Davis-Bacon Related Acts (DBRA), including the Contract Work Hours and Safety Standards Act (overtime compensation provision), debarment is warranted whenever a contractor's violations of labor standards are aggravated or willful. (**See** 29 C.F.R. 5.12(a)(1))

Respondents' policy of not paying overtime evinces a deliberateness and willfulness alone sufficient to warrant the imposition of the debarment sanction in this case. When this illicit policy is considered in conjunction with Respondents' knowing underpayment of the required prevailing wage rates (**see** footnotes 4 and 5, **supra**) and fringe benefits (Tr. 774-775), and evidence of substantial recordkeeping irregularities including the failure to reflect on certified payrolls **any** overtime hours worked, the debarment sanction is particularly appropriate and compelling under either the Davis-Bacon Act (simple disregard) or the Davis-Bacon Related Acts (aggravated or willful disregard) debarment tests. Moreover, evidence of Respondent's violation of state prevailing wage laws and Respondent Gloria's guilty plea to state criminal charges of overtime violations (**see** CX-1) as well as Respondents' violation of federal overtime (FLSA) requirements (**see**

CX-2) provides further support for the imposition of the debarment sanction. **See, M.C. Lazzinaro Construction Corp.,** WAB No. 88-8 and 89-12 (March 11, 1991); **Matter of Property Resources Corp.,** CCH LLR WH Ad. Rulings, ¶ 32,078 (April 29 1991).

Since Respondents' prevailing wage, overtime, fringe benefit and recordkeeping violations constitute not only a disregard of their obligations under the Davis-Bacon Act, but also a reckless, aggravated, or willful disregard of their obligations under the Davis-Bacon Related Acts, Complainant respectfully submits that this Court should issue an order debarring Respondents and any entity in which they have a substantial interest pursuant to 29 C.F.R. 5.12.

RESPONDENTS' POSITION

Respondents submit that neither Mr. Gloria nor Safety should be debarred. There were technical violations of the wage and hour laws. The Department tried to make it appear that the violations were serious and that Safety knowingly violated the law. Without deprecating the importance of the wage and hour laws, the better evidence is that the violations were neither serious nor intentional. Therefore, debarment is inappropriate.

Americo Gloria, a Portuguese immigrant like many of his employees, assembled what he believed to be a fair compensation package. Safety paid its electricians the wage generally paid in the area, or better, plus benefits. The employees were glad to get the jobs. Although overtime was paid as straight time, no one was forced to work it, and employees who did not work overtime, did not suffer. These violations are not outrageous, and it is undisputed that Mr. Gloria is no longer in management and no wage and hour violations have occurred since the investigation.

Nor is there adequate evidence of bad intent. The Department infers intent from a variety of factors, including repeated violations, unverified assumptions, sloppy paperwork and lack of cooperation with the investigation. On close examination, none of these factors show bad intent.

The Department claimed that repeated violations showed intent, pointing to the state investigation and the judgement entered on nonprevailing wage claims. The Department is unfairly applying the standards of a large computerized contractor to a family business run out of the home. Safety did pay benefits and Mr. Gloria's estimate of their value was inaccurate but was based, not on his imagination, but on information supplied by an insurance agent. The information was insufficiently detailed, and the results were wrong, but the effort was made.

Mr. Gloria registered his apprentices as promptly as he could given the state of the company and the state's Department of Labor manpower shortage. He paid them as apprentices because that is what they were. It never occurred to him to double the pay of the apprentices because they could not be registered on time. The safety apprentices were generally accompanied by electricians; there were foremen on the job, and apprentice work was inspected. Safety could never have kept track of each apprentice so that every minute they spent alone would be paid at journeyman rate. The Department says that this should have been done but, under the circumstances, Mr. Gloria's assumption that he was obeying the law was not unreasonable.

While Safety's paperwork was sloppy because the business was short of cash and badly run, there was no elaborate scheme to defraud. Safety had work far beyond the capacity of its management. It went bankrupt shortly after these events. Some time cards were lost, some were corrected and some were dictated by illiterate employees to supervisors. There was no forgery or deliberate failure to keep records. The failure to individually adjust the value of the benefits for each certified payroll, like the other problems with the certified payrolls, occurred because Mr. Gloria's teenage son, compiling certified payrolls after school, photocopied old forms in haste and ignorance.

The Department relies most strongly on failure to cooperate with the investigation. It alleges refusal to provide records, alteration of records and after-the-fact creation of records. The Department also claims bribery and intimidation of Safety's employees.

However, according to Respondents, the reality is much less dramatic. The Department's investigator, egged on by an aggressive state investigator, became angry and decided that Safety was crooked when we had to redo her calculations to reflect additional time cards. Although the testimony revealed that the cards had been misplace by Mr. Gloria's teenaged son in the trunk of a borrowed car, the Department investigator, new to the job (this was one of her first prevailing wage investigations, if not the very first one), and irritated by the extra work, concluded that Safety had something to hide and started recharacterizing the evidence. Every missing record was obstruction, every erasure and strikeout on a time card was forgery, and every conversation between Mr. Gloria and an employee was intimidation. The Safety employees encouraged this picture, and told the Department investigator what whe wanted to hear, because they wanted big checks. The evidence presented at the hearing did not support this interpretation. There were bad assumptions and sloppy paperwork - not fraud.

Safety submits that it believed it was in compliance with the Act and the regulations, that Safety was a family-run business that locked the sophistication of those firms with numerous lawyers and

accountants to give competent advice before embarking upon a course of action. Safety's practices, though contrary, in some respects, to the prevailing wage laws, were clear. No one was forced to work overtime and Mr. Gloria did not pay overtime because he did not think he had to do so if the employees were free to decline it. (Tr. 765, 807) While the Administrator submits that Safety intentionally violated the law by not paying apprentices as Journeymen prior to their registration (Tr. 602-604, 671), Mr. Gloria had no idea that this was the law.

Safety tried to register apprentices on time but was prevented by a manpower shortage at the Department of Labor. (Tr. 1054-55) Although the Department investigator claimed that it was error not to register, she had absolutely no knowledge whether Safety could have registered apprentices. (Tr. 670-71) Custodio Ramos, an employee openly hostile to Safety, corroborated Mr. Gloria's testimony that he tried to register but the representative from the Connecticut Department of Labor was not there. (Tr. 92, 109-10)

The Department investigator said that Safety failed to pay apprentices as journeymen while they were working alone or while there was not a 1:1 ratio of apprentices to journeymen. (**See, e.g.,** Tr. 602-06; 614-15, 672) This had to be done even if it meant paying a different salary if the apprentice was alone for twenty minutes or so because the journeyman was away from the work site on personal matters.

Safety also submits that while its certified payrolls may have been "sloppy," they were certainly not falsified. Any errors or inaccuracies came about because of a lack of sophistication in business dealings and without any intent to deceive. With reference to the fringe benefits packages, Mr. Gloria had informally estimated the value of the benefits package from the information available to him and after a call to an insurance agent. (Tr. 772-74, 823-25) The figures given are all averages, not payments to a single person, and Mr. Gloria never intended them to be otherwise. (Tr. 826-28; 834, 1036, 993)

Moreover, much of the confusion about who did or did not have medical insurance can be attributed to the waiting period. Mr. Gloria testified that he believed that Safety's medical insurance had a three month waiting period. (Tr. 773-74, 826-27) During that time Safety was providing the benefit within the meaning of its contract, though the employee could not collect. (Tr. 774-77) The Department investigator testified that Safety should not have taken the credit for that period since it was not adjusted for individual employees. (Tr. 692-94) Mr. Gloria said that he used the cost of insurance as an average figure. (Tr. 827) The Department may have a better interpretation of the regulations, but Mr. Gloria's view is not fraudulent. (**See** Tr. 777 Mr. Gloria always intended employees to be covered after waiting period)

The Department assumed that if an employee was not paid for a sick day, the claim that sick days were provided must have been fraudulent. (McFarren, Tr. 597-98) The Department never asked if there was a reason not to pay. (**See e.g., McFarren,** Tr. 706-07)

The Department assumed that Mr. Gloria intended to defraud and looked only for evidence to support that assumption. This court has heard the evidence, including testimony from Rui Gloria, who was never interviewed by the Department, and can decide that the Department's assumption of fraud is incorrect.

Respondents also submit that the time cards were not forged, that the different hand writings, cross outs, erasures and the like on the cards were the result of normal business activity. (Tr. 840-41, 843-45, 1039-44, 1012-14) Respondents also posit that it should not be debarred because it did not obstruct the investigation, contrary to Complainant's thesis. The more credible evidence is that Safety did cooperate with the Department's investigator, that the time cards were misplaced through inadvertence in the trunk of an automobile (Tr. 999-1004) and that they were immediately made available to the investigator upon their discovery.

The worksheets also rebut the investigator's claim. If what the Department is saying is true, the worksheets completed in November and December, 1991, would have no references to time cards. Some of the worksheets, however, are dated November and December, 1991, and have columns headed "T/C," for "Time Card." How did the Investigator pull figures off of time cards in those months if she did not have any? These cards, copies of which are attached for ease of reference as Exhibit A hereto, support Mr. Gloria's testimony that time cards were made available at an early date and that the only cards produced in 1992 were those discovered in the car trunk, according to Respondents.

None of the other evidence of obstruction holds water. Ms. McFarren claimed that Safety issued two checks, one for straight time and one for overtime, and this was an attempt to obstruct the investigation. (Tr. 629) Mr. Gloria denied issuing such checks (Tr. 787-88), which are not shown in Safety's pay records, unless there was an error in issuing a payroll check. (Tr. 838)

The Department tried to make it appear that Safety created false records. During the investigation Americo Gloria reconstructed the hours worked and payments made to employees so that he could correct the breakdowns prepared by the Department investigator. (Tr. 789-90, 1069) Mr. Gloria decided to review his worksheets with the employees involved (Tr. 790), naively assuming that they would approve the figures if they were correct. Mr. Gloria did not take into account the employee's financial incentive for refusing to cooperate.

Respondents submit that the testimony of the former employees against Mr. Gloria is not credible and should be rejected because they have a powerful motive to lie, **i.e.,** they know that they could collect a substantial sum of money if, as a result of their testimony, the Administrator prevails at the hearing. They also know that they get nothing if the Administrator does not prevail herein.

Moreover, most of the former employees had no clear recollection of what days, weeks or months they worked. They acknowledged that the time records would be more accurate than their memories. **See, e.g.,** Almarindo Alves (Tr. 63-64); Edwin Cruz, (Tr. 75-76); Rocco Cuscuna (Tr. 335); Anthony Pavone (Tr. 367-68); Frank Pelaggi (Tr. 390) Edwin Cruz said that he had records - but they were burned in a fire. (Tr. 82) Rocco Cuscuna said that he had a log book that would be more accurate than his memory but did not bring it to court; "I just didn't feel I needed it." (Tr. 331) Of course, within a few minutes, Cuscuna was admitting that without records he could not remember what he did on any day. (Tr. 336) Custodio Ramos insisted that he finished work on the Bridgeport Courthouse in February, 1993 - a year after the job was over. (Tr. 86-88) **See also** Allan Peck (Tr. 187-88) (need to see time cards); Anthony Pavone (Tr. 381) (same). Some, like Rocco Cuscuna, were very positive on direct, but without records, like the log book he did not bring, could not be sure of anything on cross. (Tr. 323-24)

Respondents also point to the contradictory testimony given by these former employees as another reason to reject their testimony. In conclusion, Respondents posit that the credible evidence presented at the hearing does not show willful falsification. Any errors or omissions were corrected. Accordingly, Debarment is not appropriate herein.

On the other hand, Plaintiff submits that the evidence provides strong bases for issuance of a debarment order under 29 C.F.R. 5.12(a)(1) against Safety Electric, its affiliated corporations and Americo Gloria, their principal (herein jointly Respondents). Respondents engaged in courses of action which alone, and taken together, necessitate debarment. As the record establishes that:

1. Respondents were involved in two federally-funded projects at the Federal Building and Courthouse in Bridgeport, Connecticut and the Wastewater Treatment Facility at Ridgefield, Connecticut.

2. Respondents did not pay to certain of its employees the appropriate prevailing wages, as well as appropriate overtime and fringe benefits, as required by the Davis-Bacon Act, the

Davis Bacon Related Acts and the Contract Work Hours and Safety Standards Act.

3. Respondents knew of its obligations under the statutes and deliberately and intentionally failed to carry out their obligations.

4. Respondents filed false certified payrolls to the Department in an attempt to feign compliance with these statutes.

5. Respondents did not cooperate with the investigation and, in fact, delayed and impeded the investigation by withholding most important documents such as the time cards.

6. Respondents should be debarred for the appropriate amount of time as permitted by the statutes involved herein.

According to Complainant, under 29 C.F.R. § 5.12(a)(1), a contractor, its officers and any entity in which the contractor has a substantial interest are subject to debarment for willful or aggravated violations.

As noted in **In Re Schnabel Assoc.,** CCH LLR WH Ad. Rulings, 4-89/7-90, ¶ 31,798 at p. 43,268, the regulations do not define "willful." However, reference to recent pertinent decisions provides guidance. The Supreme Court has held that a violation of the Fair Labor Standards Act is willful if the employer knew or showed reckless disregard for the matter of whether its conduct was prohibited. **McLaughlin v. Richland Show Corp.,** 486 U.S. 128, 133 (1988). The First Circuit Court of Appeals has adopted this test for use in Age Discrimination in Employment Act cases. **Biggins v. Hazen Paper Co.,** 953 F.2d 1405, 1415 (1st Cir. 1992), **cert. granted,** 112 S. Ct. 2990, 112 S. Ct. 3035, 113 S. Ct. 38 (1992). These tests provide useful guides in evaluating Respondents' actions.

Respondents' conduct was willful under the **Richland/Biggins** standard because certain of the acts were plainly intentional, **e.g.,** failure to pay correct wages and failure to maintain proper payroll records. These acts alone warrant debarment, according to Plaintiff. **Compare A. Vento Construction,** CCH LLR WH Ad. Rulings, ¶ 31,987 (WAB 1990), at p. 43,696.

Complainant submits that such action constitutes a reckless disregard for the law. In **Petteruti v. Atwood Motors,** 102 CCH L.C. ¶ 34,631 (D. RI 1983), the court, at p. 46,634, held that where an employer made no effort to ascertain and follow the dictates of a statute (the Fair Labor Standards Act), such employer failed to act in good faith and reasonably. Likewise, in **Doty v. Elias,** 733 F.2d 720, 726 (10th Cir. 1984), the court held that where an employer never sought an opinion from an attorney or the relevant government

agency concerning the legality of his pay practices, he had failed to act in good faith or reasonably. Respondents' failure to consult the Department of Labor concerning its practices demonstrates reckless disregard.

Moreover, the violations were plainly not only willful, but were also aggravated. In contrast to "willfulness," the term "aggravated" is not clearly addressed in cases. However, the concept of aggravation bespeaks enhanced gravity. **See** Ballantine's Law Dictionary, 3d Ed., The Lawyers Cooperative Publishing Co., Rochester, NY, 1969, p. 51. The gravity of Safety's conduct was severe in both scope and effect. Numerous employees were deprived of their wages and suffered serious financial repercussions.

Thus, Safety, having acted willfully and in a manner exemplifying aggravation, cannot establish a valid contest regarding debarment. There is no question that failure to pay appropriate wages or the prevailing wage warrants debarment. It is precisely the type of conduct condemned in **Labor Servs. supra, and in In Re Richard K. W. Tomn, supra.**

Safety's failure to pay employees at the correct rate for all time worked is likewise a debarment offense.

In summary, Complainant submits that Respondents' actions, taken separately and as a comprehensive program of pay practices, "exemplify the type of misconduct which Congress sought to address by debarment." **See Janik Paving & Const., Inc. v. Brock,** 828 F.2d 84, 90-91 (2d Cir. 1987)(debarment can be a serious blow to firms specializing in government business but it may be the only realistic way to deter contractors from willfully violating the law, based on a cold weighing of costs and benefits).

On the other hand, Respondents argue that Plaintiff has failed to establish that any alleged or admitted violations of the Davis-Bacon or related acts were aggravated or willful violations and that the request to debar Mr. Gloria and any affiliated corporations should be denied.

While Respondents have conceded that violations of the Act and regulations have occurred, Respondents argue that there is no evidence that these were willful and the totality of the circumstances is such that debarment is not warranted. A review of all of the facts and circumstances in this case will show that there were systems in place designed to comply with the statute and regulations and that any violations were inadvertent and not the result of willful action, according to Respondents.

As already noted above, the term "willful" is not defined in the regulations but has been interpreted to mean ". . . intentional or knowing violation of the applicable act . . ." or ". . .

voluntary intentional violation of a legal duty . . .” **U.S. v. Bishop,** 412 U.S. 346, 356; **U.S. v. Drape,** 668 F.2d 22, 26 (1st Cir. 1982) as cited in **In Re M.G. Allen & Assoc.,** 29 W.H. cases at 388, 189. In providing some definition to the terms “willful” and “aggravated,” factors to be considered include: the nature, extent and seriousness of past violations; the nature, extent and seriousness of the present violations; the presence of any culpable conduct, such as deliberate falsification of records; the presence of bona fide legal issues of dispute; the cooperation of the respondent in the resolution of issues and the demonstration of a desire and intention to comply with the Act; and the payment of such sums admittedly owed to employees.

I have extensively summarized the parties’ positions to put this issue in proper perspective.

In the case at bar, Complainant has requested debarment of Respondents for the full three years permitted by Section 5.12.

As extensively summarized above, Complainant submits that debarment for the full term is applicable because Respondents’ actions were “aggravated or willful” and Respondents argue that any violations resulted from honest mistakes and just plain confusion.

On the basis of my reading of Section 5.12 and pertinent case law, I find and conclude that the word “willful” means an intentional or knowing violation of the applicable acts. The term “willfully” simply means a voluntary, intentional violation of a known legal duty.” **U.S. Drape,** 668 F.2d 22, 26 (1st Cir. 1982), citing **U.S. v. Pompanio,** 429 U.S. 10, 12 (1976). Moreover, “a willful violation is one done either with an intentional disregard of, or plain indifference to, the statute.” **A. Schonbek & Co. v. Donovan,** 646 F.2d 799 (4th Cir. 1975); **Inter County Const. Co. v. OSHRC,** 4522 F.2d 777, 779 (4th Cir. 1975)(“willful” means action taken knowledgeably); **Boston & M.R.R. v. U.S.,** 142 F.2d 132, 137 (1st Cir. 1944)(“willful” means knowingly and deliberately).

After an analysis of the regulations and pertinent cases dealing with the term “willful,” I find and conclude that the term willful as used in the regulations means an intentional or knowing violation of the applicable acts.

The criteria for debarment under a Davis-Bacon Related Act case is whether a contractor has committed willful or aggravated violations of the labor standards provisions of any of the applicable statutes under Section 5.1. If a contractor is found to be in willful or aggravated violation of the provisions, such contractor shall be ineligible to receive any contracts subject to the statues listed in § 5.1 for a period **not to exceed three years.**

In their reply brief (RX 14), Respondents submit that Complainant's revised wage calculations (CX 25) are erroneous as based on the fact that the "Department uncritically accepted the statements" of Respondents' employees, Respondents essentially submitting that "the testimony of these individuals should not be believed." Moreover, Respondents have submitted as Exhibit A to RX 14 their own wage calculations based on the certified payroll records and the time cards. (RX 14)

I would simply note at this point that Respondents' employees presented by the Complainant testified credibly before me and their testimony withstood intense cross-examination by Respondents' counsel. I simply place little or no credence on Respondents' certified payroll records or the time cards as they were uniformly falsified to feign compliance with the statutes and which documents bear little resemblance to reality. Respondents' actions brought about this situation and Respondents, not the employees for whose benefit the statutes were passed, should bear responsibility herein.

As already noted above, Respondents' documents are certainly unreliable and the Administrator has reconstructed the back wages due herein based on those employees who testified credibly, under oath, before me. Such reconstruction was necessitated by Respondents' unreliable and falsified certified payroll records and it is certainly disingenuous for Respondents to now request that I accept their wage calculations based on fraudulent certified payroll records, time cards containing erasures, different hand writing, etc., as well as Mr. Gloria's self-serving statements. This I cannot do because Respondents have brought about this situation. Respondents who have failed to keep accurate records of employees' hours worked may not complain that the Administrator's back wage computations are imprecise. Thus, Respondents, in my judgment, should bear the burden of any "imprecise" back wage calculations.

In the instant case, based upon the totality of this closed record, I find the record supports the conclusion that Respondents and their principals violated the Act willfully and in an aggravated manner. Therefore, the sanction of debarment is appropriate.

As mentioned earlier, this Court, in examining the facts and circumstances surrounding the violative practices in debarment practices, must also consider other significant factors such as the severity of the violations, the presence of any culpable conduct, such as deliberate falsification of records, the presence of **bona fide** legal issues of dispute, Respondents' cooperation in the resolution of the issues, their attitude toward compliance, and past compliance. These factors must be considered because, in my judgment, they are relevant to the "willful or aggravated"

provisions of Section 5.12. This closed record leads to the conclusion that Mr. Gloria fully engaged in a pattern of activity to evade the Act by engaging in the practices challenged herein by Complainant. Those practices have already been summarized at length above and will be briefly reiterated at this point in the next section.

TIG Insurance Company, as the assignee of North American Construction Corporation's interest in $49,686.95 which was paid by the latter firm and is currently being held in escrow by the Department of Labor, has been granted status as an intervenor as there was no objection to the motion filed by counsel by letter dated February 20, 1996. (TIGX 1) TIG's claim should be presented to the Wage and Hour Division for consideration and resolution.

I have considered the parties' respective positions as represented by their documentary exhibits and testimonial evidence in the closed record before me. I have accepted the Complainant's position as it is supported by the credible, probative and persuasive evidence. I have also accepted the testimony offered by Complainant's witnesses as being more credible and such testimony leads to the conclusion that Respondents have established a pattern of activity which contravenes the Act and, therefore, I issue the following:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Americo Gloria formed and operated a firm under the name of Safety Electric Construction Co., Inc. (jointly referred to as Respondents).

2. At all times relevant herein, Respondents have been subject to the provisions of the Act while working on and providing services at the federally-funded projects which are identified in the caption of this proceeding.

3. Respondents employed certain individuals to perform services at those federally-funded projects.

4. Respondents are subject to the provisions of the statutes involved in this proceeding, **i.e.,** the Davis-Bacon Act, 40 U.S.C. § 276(a), et seq., the Davis Bacon Related Acts, as denoted at 29 C.F.R. Part 5, the Contract Work Hours and Safety Standards Act, 40 U.S.C. § 327, et seq., and the applicable implementing regulations issued thereunder at 29 C.F.R. Part 5, Sections 5.11(b) and 5.12 (herein jointly referred to as the Act).

5. Respondents knew their obligations under the Act to pay their employees on those projects the prevailing wage rates, appropriate fringe benefits and overtime.

6. Respondents knew that the wages being paid to the employees did not satisfy their obligations under the Act.

7. Respondents' pattern of business projects on those projects violated the provisions of the Act.

8. Respondents' certified payroll records were not in compliance with the requirements of the Act.

9. Respondents have also misclassified certain employees on those projects.

10. Respondents' actions herein constituted willful or aggravated violations of the labor standards of the Acts involved herein.

11. Respondents' actions warrant debarment for the full three year period of time, pursuant to 29 C.F.R. § 5.12(a)(1) and an appropriate ORDER shall be entered.

The Respondents further submit that the workers agreed to work for certain wages per hour, that this proceeding has brought out their greed, that the workers have greatly exaggerated their hours worked and that this proceeding, if successfully prosecuted by Complainant, will result in an unconscionable windfall to the employees.

I reject that argument and I accept Complainant's wage reconstructions because the Respondents have brought about this situation by maintaining incomplete, inadequate and inaccurate records and it is well-settled that Respondents, having brought about this situation, cannot benefit from such bookkeeping practices to the detriment of their workers, as already noted above.

As has been stated many times, back wages were due employees of a motel and restaurant and the back wage calculations were based on just and reasonable inferences since the employer failed to prove the precise amount of work performed to negate the inferred amounts. **See e.g., Martin v. Deiriggi d/b/a Belmont Motor Inn and Caesar's Supper Club,** 120 L.C. ¶ 35,578 (N.D. W. VA. 1991).

Therefore, in conclusion, I find and conclude that the ACT has been violated as alleged by Complainant, that the employees as identified in the Complainant's Revised Summary of Unpaid wages (Form WH-56) (CX 25) are entitled to the back wages as calculated by Complainant, that such unpaid wage calculations are incorporated herein by reference and that the above-named Respondents shall be debarred for the full three year period.

ORDER

1. The Administrator shall pay the amount of back wages due the employees who are identified in the Summary of Back Wages (Form WH-5), as reflected in the revised Form WH-56 in evidence as CX 25.

2. Americo Gloria, Safety Electric Construction Co., Inc., including any firm in which the named individual has a substantial interest, shall be debarred in accordance with the provisions of 29 C.F.R. § 5.12(a)(1) for a period of three years and shall be ineligible to receive any contract or subcontract subject to any of the statutes listed in 29 C.F.R. § 5.1

3. As TIG Insurance company has been granted status as an intervenor herein, the firm, as assignee of North American Construction Corporation, shall submit its claim to and for consideration by the Wage and Hour Division, U.S. Department of Labor, for any monies which may be remaining after the named employees are paid their appropriate back wage, a claim over which I render no opinion herein.

_____

DAVID W. DI NARDI
Administrative Law Judge

Dated:

Boston, Massachusetts

DWD:gcb